Finally it was contended on behalf of the caveator that in so far as the two sums forfeited exceeded ten per cent of the purchase price under the former agreement, viz. $77,765, they amounted to a penalty against which the court would grant relief and that the caveator was entitled to an equitable charge upon the land for the amount of the excess, *viz.* $50,000.

This contention was rejected by the learned judge; and although it was raised in the Memorandum of Appeal to the Federal Court it was abandoned by counsel for the caveator at the hearing of the appeal. So their Lordships need say no more about it, except that the removal of the caveat will not prevent the caveator, if he is so advised, from pursuing his claim that monies that the caveatees have forfeited amounted to a penalty and are recoverable.

Their Lordships therefore see no ground upon which an appellate court would be justified in interfering with the way in which Ajaib Singh J. exercised his discretion to order the removal of the caveat.

In the Federal Court the argument appears to have turned upon the circumstances in which the Sale Agreement was terminated. Time being of the essence of the provisions in the Sale Agreement for payment of the purchase price, the failure of the caveator to pay on the due date was a breach of condition which the caveatees were entitled to elect to treat as bringing the contract to an end. This they did by their letters of September 30, 1974. It would appear that the Federal Court took the view, which their Lordships have already held to be erroneous, that once the caveator had asserted in his affidavit that the Sale Agreement had not been lawfully terminated and had commenced an action for specific performance of it, the court had no option but to leave the caveat in existence until the action was tried. The Federal Court accordingly did not consider whether the learned judge's evaluation of the affidavit evidence on which he based the exercise of his discretion was manifestly wrong.

For the reasons given earlier in this opinion their Lordships consider that Ajaib Singh J.'s evaluation of the affidavit evidence was justified and that there is no ground for an appellate court to interfere with the way in which his discretion was exercised.

Their Lordships will accordingly advise His Majesty the Yang di-Pertuan Agong that this appeal should be allowed with costs here and in the Federal Court and that the order of the High Court of November 10, 1975 should be restored.

Appeal allowed.

Solicitors: *Gasters; Smiles & Co.*

SINGAPORE REPORTS

CHUA HONG HOON CO. LTD. v. GOLD COIN LTD.

[C.A. (Chua, Choor Singh & Rajah JJ.) May 25, 1979]
[Singapore — Civil Appeal No. 61 of 1978]

Torts — Negligence — Two independent tortfeasors — Damages — Fire started on one lighter and spreading to another — Damages to goods on second lighter — Common law liability of owners of both lighters — Fires (Prevention) Metropolis Act, 1774 (United Kingdom).

The first defendants and the appellants were lighterage companies. The first defendants had agreed to provide lighters for the carriage, custody and care of the respondents' goods. Pursuant to this agreement the first defendants received 1,466 bags of rice bran and 657 bags of ground cakes belonging to the respondents, which were discharged from the vessel "Kota Naga" into the first defendants' lighter bearing registration number SC6875. The said lighter was subsequently moored at Telok Ayer Basin. The appellants' lighter SC7950 which was loaded with a cargo of rubber was moored next to her. On the night of July 25, 1973, lighters SC6875 and SC7950 caught fire and the goods of the respondents in lighter SC6875 were damaged.

The learned judge found that the fire started on the appellants' lighter SC7950 and it spread to the first defendants' lighter. The first defendants' lighter was in a place where it was grounded at low tide.

The appellants appealed.

Held, dismissing the appeal: (1) the common law liability applied in this case as the fire started not on land but on a lighter of the appellants moored in a harbour. The appellants had not brought themselves within any of the defences open to them;

(2) the present case concerned two independent tortfeasors causing the same damage to the respondents. The trial judge found both defendants to blame and he rightly apportioned the liability.

Case referred to:-

(1) *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330.

COURT OF APPEAL.

K.E. Hilborne for the appellants.

Y.H. Cheong for the respondents.

Cur. Adv. Vult.

Chua J. (delivering the judgment of the Court): This appeal arises from a claim by the respondents for damages (1) against the first defendants as bailees for reward for breach of contract and/or duty in and about the carriage and/or care and custody of the respondents' goods and (2) further or in the alternative, against the first defendants and the appellants or either one or the other of them for loss and damage caused to the respondents' goods on or about July 25, 1973, through the negligence of the first defendants and the appellants or either one or the other of them, in the handling or management of lighter bearing registration numbers SC 6875 and SC 7950 respectively.

By judgment dated September 8, 1978, judgment was given for the respondents in the sum of $46,949.41 with interest from September 21, 1974, to date at 8% and interest thereafter at 8% also till date of payment and costs against the first defendants and the appellants equally. The appellants now appeal against that judgment. The first defendants have not appealed.

The short facts are these. Both the first defendants and the appellants are lighterage companies. By

a contract in writing dated December 19, 1972, the first defendants agreed with the respondents for the consideration therein mentioned to provide lighters for the carriage and/or custody and care of the respondents' goods as and when required during the period January 1, 1973, to December 31, 1973, upon the terms and conditions therein stated. On or about July 14, 1973, in pursuance of the said contract, the first defendants received 1,466 bags of rice bran and 657 bags of groundnut cakes, the property of the respondents, which were discharged from the vessel "Kota Naga" into the first defendants' lighter bearing registration number SC 6875 for carriage from alongside the "Kota Naga" to Telok Ayer Basin wharf from whence the first defendants were to keep the same in safe custody for subsequent delivery to the respondents. At Telok Ayer Basin the first defendants' lighter SC 6875 was moored next to the appellants' lighter SC 7950, which was loaded with a cargo of rubber. There were about six lighters moored there side by side. On the night of July 25, 1973, lighters SC 6875 and SC 7950 caught fire and the goods of the respondents in lighter SC 6875 were damaged.

The learned judge found that the fire started on the appellants' lighter SC 7950 and it spread from the appellants' lighter to the first defendants' lighter SC 6875. He also found that the first defendants' lighter SC 6875 was in a place where it was grounded at low tide and the first defendants' lighterman was therefore unable to move the lighter SC 6875 to safety although he had ample time to do so. The learned judge held that the first defendants had been negligent and liable as they had allowed their lighter to be grounded there at low tide.

The learned judge held that the appellants were also liable as the fire originated from the appellants' lighter. The learned judge said that in the circumstances here the appellants' liability under the common law was almost absolute; that once there was a fire on the appellants' lighter the onus was on the appellants to bring themselves within one of the exceptions; and that the appellants had not discharged the onus.

The main complaint of the appellants is that the learned judge was wrong in applying the doctrine of *Rylands* v. *Fletcher*[1] on the facts of this case. It is submitted that the learned judge ought not to have applied that doctrine in the absence of satisfactory evidence as to the real origin and cause of the fire. Mr. Hilborne, counsel for the appellants argued that the burden of proving that the origin of the fire was due to the negligence of the appellants or their servants or agents was upon the respondents as the plaintiffs in the action and this burden the respondents had failed to discharge because there was no evidence, or insufficient evidence to establish where and/or how the fire started, and neither did the learned judge make any finding on these matters capable of supporting the judgment.

We do not accept the contention of Mr. Hilborne, that there was no evidence or insufficient evidence to establish where the fire originated.

The evidence of Tan Hock Lai, the lighterman of the first defendants, who was sleeping on one of the lighters moored there when the fire started, was that when he woke up he found that there was a fire on the appellants' lighter and that the fire spread from the appellants' lighter to the first defendants' lighter.

The evidence of Mohamed Arshad bin Haji Anang, the lighterman of the appellants, was that he was sleeping on the deck of his lighter and he heard a commotion and people were shouting "Fire, fire". He woke up and saw a fire on the first defendants' lighter and the fire spread to his lighter. After the fire, Mohamed Arshad made a report to the P.S.A. Police at 0958 hrs. on July 26. This report (P1) was admitted in evidence. In it Mohamed Arshad said:

"....

> At about 10 p.m., I had my dinner on the rear deck with the aid of a small kerosine lamp. I then placed the kerosine lamp on the deck as there was no nail to hang it. Then I went to sleep. Half an hour later, I heard people shouting "Fire". I got up and saw the fire at the place where I placed the kerosine lamp. I attempted to put it off, but the fire spread to the canvas covering due to the wind. I was unsuccessful in my attempt to put off the fire and sustained injury on my face. I then jumped to a nearby lighter as I was helpless. The fire also spread to nearby four lighters...."

We agree with Mr. Hilborne that the learned judge was in error in ruling that P1 was admissible under section 21 of the Evidence Act as it amounted to an admission adverse to the appellants' interest. But P1 is admissible under section 155 of the Evidence Act to impeach the credit of Mohamed Arshad.

In their defence the appellants never alleged that the fire spread from the first defendants' lighter to their lighter.

The learned judge was fully justified in accepting the evidence of the first defendants' lighterman that the fire originated from the appellants' lighter and spread to the first defendants' lighter.

Mr. Hilborne cited to us para. 526 of *Charlesworth* on Negligence (6th Ed.) in support of his submission that the burden of proving that the origin of the fire was due to the negligence of the appellants or their servants, rests firmly on the respondents, the plaintiffs. That is the law in England after the Fires Prevention (Metropolis) Act, 1774.

At common law if a fire started in the house or land of one man and spread to the land of another, the person from whose house or land the fire started had to make good the damage. His liability was not based on negligence but was that of an insurer. It was a strict liability and it was not necessary to prove negligence. The only defences were those set out in *Rylands* v. *Fletcher* such as an act of God or the independent act of a third party. (Para. 1511 *Clerk & Lindsell* on Torts, 14th Ed.).

The Fires Prevention (Metropolis) Act, 1774 modified the common law liability by providing "no action, suit or process whatever, shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall ... accidentally begin." The common law liability still remains in all cases which are not covered by the said Act.

In the present case the common law liability ap-

plies as the fire started not on land but on a lighter of the appellants moored in a harbour. The appellants have not brought themselves within any of the defences open to them.

It is next submitted that the learned judge was wrong in apportioning the damages as between the two defendants. Mr. Hilborne argues that the learned judge treated the action as if it was a claim by the respondents against the first defendants and the appellants as joint tortfeasors which it is not. There is no substance in this submission. The learned judge did not in his judgment say that he was treating the two defendants as joint tortfeasors. This is a case of two independent tortfeasors causing the same damage to the respondents. The trial judge had found both defendants to blame and he was quite right to apportion the liability.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Hilborne & Co.; Chan, Goh & Co.*

THE "AMERICAN ASTRONAUT"; "AMERICAN ASTRONAUT" OWNERS & ORS. v. KIAN HIN HANG (PTE.) LTD.

[C.A. (Wee Chong Jin C.J., Chua & Rajah JJ.) September 4, 1979]

[Singapore — Civil Appeal No. 74 of 1978]

Shipping Law — Container — 580 cartons of toilet soap packed in sealed container — Short-delivery — Bills of lading — Conditions attached — Claim for loss allowed — Appeal — United States Carriage of Goods by Seat Act, 1936, s. 3(3), (4) & (8) — Carriage of Goods by Sea Act (Cap. 184), art. III para. 8 of Schedule.

Bills of lading — Conditions "House to Pier Container" and "shipper's load, stowage and count" on bill of lading — Effect of — United States Carriage of Goods by Sea Act, 1936, s. 3(3), (4) & (8) — Carriage of Goods by Sea Act (Cap. 184), art. III para. 8 of Schedule.

Containerisation — Conditions "shipper's load, stowage and count" qualifying carrier's liability in relation cargo packed and sealed in container — Not contrary to s. 3(8) of United States Carriage of Goods Act, 1936 — Carriage of Goods by Sea Act (Cap. 184), art. III para. 8 of Schedule

This appeal arose from a claim by the respondents (see [1979] 1 M.L.J. 216) as holders of a bill of lading against the appellants as carriers for short-delivery of 205 cartons of soap, part of an alleged shipment of 580 cartons on board the vessel "American Astronaut." The said 580 cartons were shipped in a sealed container from New York to Singapore under a bill of lading issued by the carrier in New York.

The "American Astronaut" arrived in Hong Kong and the cargo covered by the said bill of lading was there transhipped for delivery to Singapore on board the "American Mist."

The bill of lading in this case contained, *inter alia*, two notations, "House to Pier Container..." and "shipper's load, stowage and count."

The learned trial judge held that the plaintiffs/respondents were not disentitled by the said conditions in the bill of lading from relying on the admission that cartons to the number stated in the bill of lading were packed in the container and the defendants/appellants were accordingly liable to deliver the full number of cartons.

The defendants appealed.

Held, allowing the appeal: (1) the learned trial Judge had failed to appreciate that the notations used here were in respect of a container packed, sealed and loaded on the vessel by either the shipper or his agent and not in connection with cargo which could have been seen and checked;

(2) such phrases as "House to Pier Container" and "shipper's load, stowage and count" when applied to containers are not a form of non-responsibility clauses and therefore not contrary to section 3(8) of the United States Carriage of Goods Act, 1936 which corresponds with article III, para. 8 of the Schedule to the Carriage of Goods by Sea Act;

(3) the bill of lading in this case did not bind the carrier to any representation as to the condition or description of the contents so as to constitute an estoppel in favour of the respondents;

(4) the respondents had not discharged the onus of proving that 580 cartons of soap were shipped at New York in the appellants' ship "American Astronaut."

Case referred to:-

(1) *Spanish American Skin Co.* v. *M.C. Ferngulf* (1957) A.M.C. 611.

CIVIL APPEAL.

G. Panirselvam for the appellants.

Cheong Yuen Hee for the respondents.

Wee Chong Jin C.J. (delivering the judgment of the Court): This appeal arises from a claim by the respondents (plaintiffs) as owners and/or endorsees of a bill of lading against the appellants (defendants) as carriers for $16,912.50 being the cost of 205 cartons of Camay Soap, part of an alleged shipment of 580 cartons of such soap on board the vessel "American Astronaut" in a sealed container at New York and for carriage from New York to and delivery at Singapore under a bill of lading issued by the carrier in New York and dated October 8, 1974, but not delivered to the respondents, the consignees in Singapore.

The carriers issued the said bill of lading in conformity with the United States Carriage of Goods by Sea Act, 1936, relevant parts of which read as follows:—

"Section 3(3) After receiving the goods into his charge the carrier or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things —

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: Provided, That no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

(4) Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b) and (c) of this section...."

(8) Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than